

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS LEE HOLLADAY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-09-2963
	§	
KINDER KNIGHT, INC. f/k/a	§	
KINDER MORGAN, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Pending before the court is Plaintiff's Opposed Motion to Non-suit Defendant Kinder Knight, Inc., f/k/a Kinder Morgan, Inc. Without Prejudice (Docket Entry No. 4). Having carefully reviewed the motion, Defendant's Opposition (Docket Entry No. 5), and Plaintiff's Reply (Docket Entry No. 6) the court is persuaded that the motion should be granted.

Because the defendant has filed an answer in this action, plaintiff's motion is governed by Fed. R. Civ. P. 41(a)(2). Although the defendant has included affirmative defenses in its answer, defendant has not filed a counterclaim against plaintiff. Absent a showing of legal prejudice to the defendant or absent some evidence of abuse by the plaintiff, the court should generally grant a motion to dismiss under Rule 41(a)(2). Elbaor v. Tripath Imaging, Inc., 279 F.3d 314 (5th Cir. 2002). To show prejudice a defendant must normally show that it will suffer some type of legal

harm if the case is dismissed. "Legal harm" to a defendant that will preclude a plaintiff's voluntary dismissal must be some legal prejudice other than the mere prospect of a second lawsuit. Durham v. Florida East Coast Railway Co., 385 F.2d 366, 368 (5th Cir. 1967).

Having considered the parties' arguments the court is persuaded that defendant has failed to present any evidence of abuse by the plaintiff, and that the defendant has failed to show that it will suffer any legal prejudice if this case is dismissed without prejudice. Accordingly, Plaintiff's Opposed Motion to Non-suit Defendant Kinder Knight, Inc., f/k/a Kinder Morgan, Inc. Without Prejudice (Docket Entry No. 4) is **GRANTED**; and this action will be dismissed without prejudice.

SIGNED at Houston, Texas, this 10th day of December, 2009.


SIM LAKE
UNITED STATES DISTRICT JUDGE